UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, vs. Tyson Foods, Inc., et al., Defendants.	**Case No. 4:05-cv-00329-GKF-PJC** **DEFENDANTS' REPLY IN SUPPORT OF OMNIBUS MOTIONS IN LIMINE (DKT. NO. 2415)**

Defendants offer the following replies to Plaintiffs' Responses to their Omnibus motions limine (Dkt. No. 2502) and in support of their Omnibus Motions in Limine (Dkt. No. 2415).

1. The Court Should Exclude Nutrient Management Plans from Watersheds Other than the IRW.

The Court should exclude as irrelevant Nutrient Management Plans ("NMPs")[1] from watersheds other than the IRW. Plaintiffs' response asserts such NMPs are relevant because they show (1) that Defendants knew that pollution would result from land application of poultry litter and (2) that overapplication of litter was an "industry practice." (See Dkt. No. 2052 at 1-2).[2] But Plaintiffs do not explain **how** NMPs from other watersheds would demonstrate these

[1] For convenience of reference, the present motion uses the term "NMP" to refer to both Nutrient Management Plans and Animal Waste Management Plans, both of which are or were prepared and drafted pursuant to statutory standards.

[2] Specifically, Plaintiffs assert that these NMPs:

> go to show that Defendants knew or should have known that the land-application of poultry waste would result in the type of environmental pollution at issue in this case. They also demonstrate the related fact that the excessive land application of poultry waste, with resulting increases in soil test phosphorus ("STP") levels, is part of an industry practice (including in the watershed right next door).

(Dkt. No. 2502 at 1-2.)

points. If anything, such NMPs (1) reinforce Defendants' reasonable belief that grower compliance with the state-approved limitations in the NMPs would *prevent* any adverse environmental consequences and (2) show that the Defendants' contract growers actually *avoided* overapplication through compliance with the NMPs. Plaintiffs' argument for the supposed relevance of these NMPs simply makes no sense.[3]

The fact that Plaintiffs' experts Bernie Engel and Bert Fisher used non-IRW NMPs in forming their expert opinions here (see Dkt. No. 2502 at 2) does not make the NMPs either relevant or admissible. As Federal Rule of Evidence 703 states in pertinent part:

> Facts or data [forming the basis of an expert's opinion] that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Plaintiffs' response here does not even try to make a showing that the non-IRW NMPs will provide such unique assistance to the jury in understanding Dr. Engel's or Dr. Fisher's opinions.

The fact that the Eucha-Spavinaw NMPs were prepared under court supervision as a result of the City of Tulsa settlement does not support their admission as Plaintiffs urge (see Dkt. No. 2502 at 2), but in fact undercuts any relevance. These NMPs were prepared under a unique set of limits and restrictions, restrictions set by mutual agreement through the litigation process rather than through scientific analysis by agency experts. As a result, the Eucha-Spavinaw NMPs have no relevance either to the IRW NMPs that governed the grower applications at issue here or to the circumstances and conditions that influenced the terms of the NMPs for the IRW.

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[3] Moreover, the NMPs Plaintiffs propose to offer cannot of course demonstrate any knowledge of any sort on the part of any Defendant unless Plaintiffs can show that that Defendants possessed the NMPs or otherwise knew their contents. Plaintiffs' discovery responses have identified no evidence of any such possession or knowledge.

Finally, Plaintiffs' response entirely ignores Defendants' discussion of the unfair prejudice of admitting these NMPs (see Dkt. No. 2415 at 2), and instead simply and baldly asserts that "Defendants have not demonstrated" that prejudice outweighs probative value (Dkt. No. 2502 at 2-3). The Court should grant Defendants' motion.

2. The Court Should Exclude Evidence Concerning the City of Tulsa Case.

The Court should exclude any testimony or documents concerning the City of Tulsa v. Tyson Foods case, Docket No. 01 CV 0900EA(C) (N.D. Okla.) as irrelevant, unfairly prejudicial, and violative of Rule 408's bar on introduction of settlements.

As a threshold matter, Plaintiffs exaggerate the scope of Defendants' motion. Contrary to Plaintiffs' implication (see Dkt. No. 2502 at 3-5), Defendants do not ask the Court to issue a blanket exclusion of every document or deposition that may have been generated in the course of the City of Tulsa case. Defendants do not dispute that the Court will need to address such documents and depositions on an individual basis.

The motion at hand is addressed to particular documents that Plaintiffs have listed on their exhibit list that specifically concern the City of Tulsa litigation itself. Plaintiffs' response never addresses this issue head on. For example, Plaintiffs offer no explanation of how the specific court orders and motion papers from the City of Tulsa case that Defendants identified in their initial motion[4]—all of which Plaintiffs propose to offer as trial exhibits here—have any bearing on the issues before the fact finder in this case. (See Dkt. No. 2502 at 3-6.)

Plaintiffs fare no better with their claim that the City of Tulsa action somehow provided

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[4] See Dkt. No. 2415 at 2-3, citing Pls.' Ex. 3873 (Order on Defs.' Emergency Application for Order Approving Phosphorus Index), Pls.' Ex. 3874 (Order on Pls.' discovery motion regarding USDA documents). and Pls.' Ex. 3361 (Poultry Defs.' Resp. to Pls.' Mot. for Partial Summ. J. on Liability for Grower's Disposal of Poultry Manure).

Defendants notice that the land application of poultry litter caused "environmental problems generally." (Id. at 5.) A different plaintiff's assertion of a claim alleging different theories against different parties based on a different set of facts does not, indeed cannot, provide notice that is relevant to the present issues. See, e.g., Halverson v. Indep. Sch. Dist. No. I-007, 2008 U.S. Dist. LEXIS 96445, at *6-7 (W.D. Okla. Nov. 26, 2008) ("Even assuming that the District had actual knowledge of other incidences of sexual harassment from other students based upon other lawsuits, the Court finds that the prior case, … which involved an alleged incident occurred almost five years prior to the incident in this case is too distant in time and the remaining case on which plaintiff relies, … is too dissimilar and too infrequent to constitute actual notice of a substantial danger to plaintiff.")

Further, the mere assertion of an unproven claim does not constitute "notice" of the alleged but unproven factual basis for that claim. Put another way, the City of Tulsa claims could bear on the issue of whether Defendants had "notice" that the waste disposal practices at issue caused "environmental problems" ***only*** if those claims asserted were in fact valid. But the Plaintiffs in the City of Tulsa case never proved its claims; instead, it voluntarily dismissed those claims with prejudice, based on an agreement that specifically noted the defendants' continued denial of the claims, leaving the validity of the claims entirely unproven. (See Settlement Agreement: Dkt. No. Dkt. No. 2415-3 at 14, 27.)

The unproven nature of the City of Tulsa claims is fatal to any assertion of relevance here. The Court cannot of course determine the validity of the City of Tulsa claims in the present litigation; the parties have not prepared to try that case, and any such effort would significantly confuse the issues and nearly double the length of the trial. See, e.g., Kinan v. Brockton, 876 F.2d 1029, 1035 (1st Cir. 1989) (upholding exclusion of evidence from other

cases as it "would inevitably result in trying those cases, or at least portions of them, before the jury," inextricably intertwining the merits of all the cases, thus resulting in "confusion and the consumption of a great deal of unnecessary time," particularly given that the other cases were settled "on the basis of negotiations, not findings of fact.").

Besides, resolving the validity of the claims *now* could not in any event provide notice to Defendants back in 2003, as Plaintiffs urge. Nor may the Court simply *assume* that the City of Tulsa claims were valid. The only basis Plaintiffs offer for such an assumption is the Settlement Agreement itself, and of course using that Agreement to prove underlying liability is exactly what both Rule 408 and sound public policy prohibit.

Finally, and perhaps most critically, Plaintiffs fail to overcome the Rule 408 bar on the admission of settlement agreements and negotiations. Plaintiffs claim that the Settlement Agreement here comes within the exception to Rule 408 because "it would be offered to demonstrate the control that is and can be exerted by the integrators over their growers and over the disposal of poultry waste." (Dkt. No. 2502 at 5-6.) This argument fails for several reasons.

First, Plaintiffs disregard the fact that their proposed use of the Settlement Agreement would in fact employ that Agreement to try "to prove liability for … a claim that was disputed as to validity," the very purpose that Rule 408 forbids. (See discussion at Docket No. 2415 at 4.)

Second, Plaintiffs' response ignores the undisputed fact that fully half of the Defendants in the present case were not even parties to the City of Tulsa case,[5] and the Settlement Agreement

[5] Specifically, present Defendants Tyson Poultry, Inc., Tyson Chicken, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill Turkey Production, LLC, and George's Farms, Inc. were not parties in the City of Tulsa case.

thus does not even arguably reveal anything about those Defendants' "control" over or individual contractual relationships with their contract growers. (See discussion at Docket No. 2415 at 5.)

Third, despite Defendants' thorough dissection of the Settlement Agreement in their original motion that showed that the Agreement in fact suggests nothing about any integrator's control of grower litter application practices (Dkt. No. 2415 at 4-5), Plaintiffs' response does not even try to justify their claimed interpretation of the document. Plaintiffs do not quote the document or address in any way what the settlement agreement actually says, and do not suggest where or how they draw an inference of "control" sufficiently powerful to outweigh the manifest prejudice of introducing the fact that some of the Defendants settled an earlier claim. See, e.g., Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1068-71 (5th Cir. 1986) (reversing and remanding for retrial where defendant was prejudiced by publishing of settlement information to jury). Instead, Plaintiffs merely assert that the parties' views of the settlement agreement differ, and that the issue therefore goes to the weight rather than the admissibility of the document. (See Dkt. No. 2502 at 6.) Defendants respectfully submit that Plaintiffs' mere assertion of a "control" exception to Rule 408, without any legal analysis or factual explanation, is not sufficient to overcome Rule 408's bar on the admission of settlement agreements.

Fourth, Plaintiffs are simply wrong in asserting that Rule 408 applies only to "confidential offers of compromise and statements made in confidential settlement negotiations." (Dkt. No. 2502 at 6.) The language of Rule 408 (quoted in full in Docket No. 2415 at 3) does not use the word "confidential" or any equivalent term, and nothing in the text of the rule suggests any such limitation. On the contrary, the rule broadly addresses evidence of "accepting … a valuable consideration in compromising … the claim," whether confidential or not. Fed. R.

Evid. 408; accord, e.g., Abundis v. United States, 15 Cl. Ct. 619, 621 (Cl. Ct. 1988)[6]; Alpex Computer Corp. v. Nintendo Co., 770 F. Supp. 161, 166 n.2 (S.D.N.Y. 1991) ("fact that settlement [is a] matter of public record does not render Rule 408 inapplicable"). Plaintiffs' legal assertion is in error.

3. The Court Should Exclude All Evidence Relating in Any Way to the Locust Grove Incident.

The Court should bar any evidence or testimony concerning the recent food poisoning incident in Locust Grove on the ground that Plaintiffs have identified no evidence from any competent source suggesting that the Locust Grove incident had anything to do with the land application of poultry litter. In their response, Plaintiffs do not deny that they have no such evidence and do not dispute the severe prejudice to Defendants that would result from even an unsupported assertion of a connection between poultry litter and the incident. Plaintiffs nevertheless oppose the motion on two grounds, neither of which is well taken.

Plaintiffs first object that Defendants are precluded from objecting to Locust Grove documents because Defendants have listed some such documents on their own trial exhibit list. (See Dkt. No. 2502 at 6-7.) But Defendants could not of course assume that the Court would grant their motion in limine to bar references to Locust Grove, so when the trial exhibit deadline arrived, Defendants had no choice but to list Locust Grove-related documents that Defendants

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[6] The Abundis court noted:

"Plaintiffs' final argument against application of Rule 408 is that since the Beatty settlement was memorialized in a court order which appears as a public record, the rationale behind the rule does not apply. They argue that no precedent exists for applying Rule 408 in this context. Given the fact that the rule does not make the distinction drawn by plaintiffs, the more appropriate inquiry would be, is there any precedent supporting plaintiffs' position? Plaintiffs offer none, and the court is not aware of any. Analytically, the fact that the settlement appears of record would not seem to satisfy any of the concerns embodied in Rules 402 or 408." 15 Cl. Ct. at 621.

would need at trial to rebut Plaintiffs' allegations in the event this Court denied Defendants' motion in limine and permitted Plaintiffs to offer such Locust Grove evidence. Plaintiffs cite no authority for the proposition that a party waives the right to object to irrelevant, highly prejudicial documents merely by listing exhibits that it would use as rebuttal should the court overrule the party's objection. Defendants' contingent listing of potential Locust Grove exhibits does not justify the denial of the motion.

Second, although Plaintiffs represent that they do not intend to offer Locust Grove evidence in their case-in-chief, they state that they anticipate:

> that Defendants will contend at trial that the land application of poultry waste and/or any contamination of the water resulting therefrom has caused no health problems, at which point the Locust Grove incident would become relevant. Thus, if Defendants open the door on this point, the State should not be precluded from using evidence relating to the Locust Grove incident to rebut Defendants' argument.

(Dkt. No. 2502 at 7.) But this argument ignores the threshold problem with the Locust Grove evidence that prompted this motion in the first place: no competent evidence links poultry litter to the Locust Grove *e. coli* outbreak. Absent such a link, the Locust Grove evidence is no more relevant as rebuttal than it would be as part of Plaintiffs' case-in-chief, and would be just as unfairly prejudicial and likely to mislead and confuse the jury.

Finally, Plaintiffs' response wholly fails to address the sheer unfairness of permitting Plaintiffs to offer such evidence when the Court foreclosed Defendants' discovery into the incident. (See Dkt. No. 2415 at 6-7.)

In sum, there is no evidence of any link between the Locust Grove incident and poultry litter, and the Court should exclude from trial all evidence about the incident.

4. The Court Should Exclude Plaintiffs' "Kitchen Sink" Exhibits and Require Plaintiffs to Provide Specific Justification for the Admission of Distinct Documents.

The Court should exclude the multiple exhibits Plaintiffs have proposed that are in

essence "kitchen sink" exhibits, that is, composite exhibits made up of often unrelated documents from a variety of sources. Plaintiffs' response declines to address the substance of this motion, arguing instead that the issue is not the proper subject of a motion in limine but should be addressed by the parties in a meet-and-confer session. (See Dkt. No. 2502 at 7-8.)

In fact, Defendants' motion is perfectly proper and is entirely in line with any reasonable reading of the Court's pretrial schedule. The Court's deadline for filing motions in limine was August 5, 2009. (Dkt. No. 2049: May 14, 2009 Scheduling Ord.) However, the parties' Agreed Pretrial Order, which will include the results of the meet-and-confer sessions concerning exhibits, is not due until August 31, 2009, weeks after the motion in limine deadline. Moreover, several of the Court's scheduling Orders have requested "briefs on unusual objections" (see, e.g., Dkt. No. 2049), a category into which the objections raised by the "kitchen sink" motion would fall. The Court's July 16 Order subsumed the "unusual objections" briefing deadline within that for motions in limine. (Dkt. No. 2347.)

Thus, to the extent that the parties' meet-and-confer sessions do not finally resolve the objections raised in Defendants' motion, Defendants urge the Court to take up this motion before trial, with or without a response by Plaintiffs, and exclude these documents on the grounds stated in Defendants' original motion.

5. The Court Should Exclude Evidence Relating to Discovery Disputes Among the Parties.

The Court should exclude Plaintiffs' exhibits and testimony concerning earlier discovery disputes among the parties. Plaintiffs' response misses the point of this motion. Defendants do not in this motion seek to exclude specific discovery responses, which may indeed be admissible under the proper conditions and when properly marked and offered as individual exhibits. The problem here, as detailed in Defendants' original motion, arises from the fact that Plaintiff's

proposed "kitchen sink" exhibits include not only discovery responses but also correspondence among counsel concerning discovery disputes. For example, as noted in Defendants' original motion, Plaintiffs' proposed Exhibit 166 includes back-and-forth exchanges between George's attorney James Graves and Plaintiffs' attorney Rick Garren concerning disputes over the George's Defendants' discovery responses.

It is the documents reflecting such discovery disputes, and not to the underlying discovery response, to which the present motion in limine is addressed. Plaintiffs' response does not try to defend the inclusion of such materials in their conglomerate exhibits and suggest no reason that such materials would be relevant or admissible. Defendants therefore ask that the Court grant their motion.

6. The Court Should Exclude Plaintiffs' Improper Rule 1006 Exhibits.

The Court should exclude several vague and misleading Rule 1006 summary documents that Plaintiffs have listed as exhibits. Again, as they did with Motion No. 4 above, Plaintiffs refuse to address the substance of the motion, claiming that the motion is premature. As the discussion above demonstrates, however, Defendants' motion is entirely appropriate, and given the schedule established by the Court had to be brought at the time Defendants brought it. Again, to the extent that the parties' meet-and-confer sessions do not finally resolve the objections raised in Defendants' motion, Defendants urge the Court to take up this motion before trial, with or without a response by Plaintiffs, and exclude these documents on the grounds stated in Defendants' original motion.

One particular exhibit in this category deserves a more specific reply. Plaintiffs' response expressly refused to address Defendants' criticism of an exemplary failure by the State under Rule 1006. Defendants pointed to the May 27, 2009 Declaration by Plaintiffs' expert Bert Fisher. Plaintiffs both used this document and its misleading attachments on summary judgment

and – as highlighted in Defendants' underlying motion – Plaintiffs marked Fisher's "Attachment A" chart as proposed Trial Exhibit 3243. (Dkt. No. 2415 at 10.) As explained in Defendants' motion in limine, as Fisher omitted record STP data helpful to Defendants, his claim that the chart amounts to "a true and correct summary" is demonstrably untrue. Rather, the Attachment A chart and its accompanying map are misleading, will confuse the factfinder, and are extremely prejudicial to Defendants, and the Court should exclude them under Rule 403. (See id. at 10-12.)

Instead of trying to explain how Fisher's materials pass muster, Plaintiffs represent that these items are "not trial exhibits subject to Rule 1006, but exhibits to summary judgment motions." (Dkt. No. 2502 at 11.) Thus, Plaintiffs urge the Court to find that "these objections specific" to the Fisher materials "are moot." (Id.) If Plaintiffs in fact do not intend to offer Fisher's charts and maps into evidence at trial—despite listing them as a trial exhibit—Defendants will of course withdraw their objection as to these particular Fisher items. If Plaintiffs are unwilling to withdraw the exhibit, however, the issue is not moot and Defendants ask the Court to grant their motion.

Date: September 4, 2009.

Respectfully submitted,

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